UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 00-2659

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UNITED STATES OF AMERICA

v.

ANN ABRAMSON,
Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE VIRGIN ISLANDS
D.C. Crim. No. 98-cr-0228-2
District Judge: Honorable Thomas K. Moore

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Argued: May 14, 2001

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Before: McKEE, RENDELL, BARRY, Circuit Judges

(Opinion Filed:)

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MEMORANDUM OPINION OF THE COURT

BARRY, Circuit Judge

On October 1, 1999, Ann Abramson was convicted by a jury sitting in the District Court for the Virgin Islands on charges of making false statements within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 and presenting false claims in violation of 18 U.S.C. § 287. Both convictions related to Abramson's involvement in the presentation and payment of grossly inflated invoices associated with repair work performed on the roof of the Arthur Richards School in St. Croix by Berthill Thomas, the contractor she hired to perform that work. Abramson now appeals, contending that there was insufficient evidence that she had knowledge of the falsity of the relevant invoices; that the District Court erred in admitting (unrelated) hearsay testimony; and that the District Court erroneously applied the Sentencing Guidelines with respect to (1) abuse of a position of trust, (2) loss calculation under U.S.S.G. § 2F1.1, and (3) more than minimal planning. We have jurisdiction pursuant

to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). After a careful review of the record,[1] we will affirm.

I.

A. Sufficiency of the Evidence

The crux of Abramson's insufficiency argument is that she approved Thomas's bills as a mere ministerial act and that the government did not present sufficient evidence to establish her knowledge of the falsity of those bills.[2] We disagree.

The evidence clearly showed that Abramson had the requisite knowledge of the falsity of Thomas's bills.[3] First, there were obvious facial inconsistencies between the various invoices, especially the first two invoices. The evidence established that, in total, Abramson

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[1]The facts underlying Abramson's case are well-known to the parties involved and will not be repeated here.

[2]"The burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high." United States v. Serafini, 233 F.3d 758, 770 (3d Cir. 2000). "In reviewing the sufficiency of the evidence to support [a] conviction, [this Court must remain] mindful of the Supreme Court's holding that an appellate court must sustain the verdict of a jury if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). "Appellate reversal on the grounds of insufficient evidence should be confined to cases *where the failure of the prosecution is clear*." Id. (emphasis added). To that end, in reviewing the evidence against Abramson, "[t]he evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt." Id.

[3]Additionally, Abramson argues that any evidence presented by the government was merely circumstantial and, thus, not sufficiently probative of any knowledge on her part. This Court has frequently noted that "intent and knowledge may be proven via circumstantial evidence." Serafini, 233 F.3d at 770. Furthermore, Abramson's contention to the contrary, "[t]he fact that evidence is circumstantial does not mean that it is less probative than direct evidence." Casper, 956 F.2d at 422.

received invoices from Thomas regarding the Arthur Richards School at three different times and in three different formats. The first set of invoices, addressed directly to Abramson and transmitted on October 9th, was comprised of the following: one bill dated October 2nd that reflected 47 hours' work at an hourly charge of $80 and two other bills, each dated October 9th, that reflected a combined total of 377 hours' work at an hourly charge of $175. (A807-809). These invoices represented that the agreed-upon work had been completed and stated a grand total (including material costs and a 20% profit) of $83,639.20. (A807-809). Also on October 9th, these three invoices were combined into a single invoice that was again addressed to and received by Abramson. (A723). While the grand total for the single invoice was the same – $83,639.20 – the hourly rate for labor on the single invoice was drastically dropped so that it would be consistent with the contracted rate of $35 per hour; the number of man hours worked was drastically increased from 424 hours – the total from the three initial invoices – to 2057 hours. (A723). Likewise, the amount of materials claimed to be used by Thomas was increased from $4,091.00 to $11,644.20. This invoice, which was signed and sent by Thomas, was eventually signed as "Approved" by Abramson despite the obvious changes from the first set of invoices that had reached her desk the same day and despite the fact that there had not been any physical inspection of the roof by the Department of Public Works.

Further circumstantial evidence of Abramson's knowledge regarding the falsity of the invoices came in the form of her own testimony. Abramson, who was routinely seen at the Arthur Richards School near the work site and who would have had to take notice of

Thomas's small roof repair crew, admitted that "it [would be] virtually impossible for Berthill Thomas and his crew of three or four men to work 2,057 man hours between September 29th and October 9th." (A631-32).

Abramson's knowledge of the falsity of the invoices could likewise be inferred from her uniquely prompt attention to getting Thomas paid. On the same day that she reviewed Thomas's first two sets of invoices (and without any inspection of the roof to validate the charges therein), she called her subordinate Keith Webster to inquire as to whether there was an account from which payment could be made. (A316-18; 328). After Webster notified Abramson that no single account had sufficient funds, Abramson told him to find accounts to pay the invoices in a split fashion. (A325-30). Webster identified the amounts that could be charged to two "Road Fund" sources – one in St. Croix and one in St. Thomas. (A325-30). As a result, two new letter format invoices were generated on October 9th in the amounts of $50,000 and $33,639.20; these newest invoices were also addressed directly to Abramson for her signature with a signature block, "Approved By: Ann Abramson, Commissioner." (A725) & (SA2).

Importantly, the fact that all the invoices from Thomas for the Arthur Richards School job were directly received by Abramson and reviewed only by her also supports the conclusion that she had knowledge of their falsity. Abramson testified that, normally, when invoices came to her for her signature they had already been reviewed by some of her subordinates; she also stated that certain initials on the invoices would so indicate. (A555-57). In the case of all of the bills submitted by Thomas regarding the Arthur Richards School

job, however, there were no such initials and, thus, no evidence of any such subordinate review. While Abramson cited this fact to exonerate herself for having missed the falsity of the invoices and essentially pleaded mere approval or mere certification, an equally acceptable, if not more acceptable, inference from the absence of initials is that the invoices were intentionally approved outside of the normal approval process to hide their falsity.

The government successfully – and correctly – argued to the jury that the above evidence showed Abramson's knowledge of the falsity of the Arthur Richards School invoices submitted by Thomas and that she aided in the offenses of presenting false claims and making false statements within the jurisdiction of a federal agency. Her sufficiency challenge is without merit.

B. Admission of Post-arrest Statements of Alleged Co-conspirator

Abramson alleges that the District Court erred when it permitted the government to elicit from Detective Peter Anderson on direct examination certain post-arrest, out-of-court statements made by Berthill Thomas. These out-of-court statements, to which Abramson objected on hearsay grounds, were: (1) Thomas's statement that he had borrowed $6,500 from Abramson to pay his workers on the Finance Department Building job and that he repaid her in cash, (A342); (2) Thomas's statement that he had spoken to Abramson several times about the $6,500 and that she told him, "Remember I loaned you money and you paid me back," (A344-45); and (3) Thomas's statement that he had been initially mistaken when he said that the money he owed Abramson was for material costs that she paid to a supply store for the Finance Department Building job because Abramson had actually gotten the

materials either through the government or her private business. (A342). Abramson's argument to the contrary, we find that these statements were nonhearsay and, thus, were appropriately admitted by the District Court.[4]

The statements at issue were correctly admitted as nonhearsay because they were not offered for the truth of the matters asserted therein. Rather, the statements were offered to demonstrate that they were made and were actually false;[5] in this regard, they were offered to show that Thomas and Abramson were actively concealing the true reasons for the $6,500 payment – it was a kickback and not repayment of a loan. The statements of one alleged co-conspirator are properly admissible against another co-conspirator in a separate trial as false exculpatory, nonhearsay statements if such statements are not admitted for their truth and are somehow relevant to proving a fact regarding the conspiracy charges pending against the defendant on trial. See, e.g., United States v. Candoli, 870 F.2d 496, 508 (9th Cir. 1989). In this case, the conspiracy count against Abramson charged that she and Thomas had conspired to commit bribery and listed the false explanations for payment as one of the overt

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[4]Because we find that these statements were properly admitted as nonhearsay, we need not decide whether the statements were also coconspirator statements in furtherance of a conspiracy, the District Court's alternative ground for admission.

[5]Other evidence showed the statements to be false: Thomas had been recently paid $83,639.20 for the Arthur Richards School job and had no need for a loan to pay his workers, and the government paid for and provided the materials that were used on the Finance Department Building job. (A331-335).

Parenthetically, we note that Abramson's contention that somehow Bruton v. United States, 391 U.S. 123 (1968), was violated by the admission not of a post-arrest confession but by an exculpatory (albeit false) explanation is, on its face, unavailing.

acts of the conspiracy. (A33-36). The false explanations given by Thomas were relevant to prove that count and, thus, were properly admitted. See United States v. Hackett, 638 F.2d 1179, 1187 (9th Cir. 1980) (stating that there is no need to limit the admission of a declarant's statements to the declarant alone where such nonhearsay statements are "relevant in some way to prove the conspiracy charged" against another as well).

C. Admission of Former Testimony of Allegedly "Unavailable" Witness

Abramson also contends that the District Court erred in admitting, at her second trial, the testimony of government witness Julian Adams from the first trial under the "former testimony" exception to the hearsay rule, Federal Rule of Evidence ("FRE") 804(b)(1). (A153). Abramson claims that Adams was not "unavailable" as that term is defined in FRE 804(a) (and is required for the admission of testimony under the FRE 804(b) exceptions to the hearsay rule). We disagree.

The crux of Abramson's argument that Adams was not "unavailable" is that the government could have subpoenaed him based upon his status as a United States citizen and that its failure to do so demonstrates that the government's efforts were less than the "reasonable means" required by the Federal Rules of Evidence. See FRE 804(a)(5). As the District Court correctly recognized, however, the government would have needed to first locate Adams in order to serve him with a subpoena. (A149, 152). In this regard, because the efforts made by the government to locate Adams prior to the second trial were identical to those that successfully secured his voluntary presence at the first trial and because the government took alternative steps when its initial efforts fell through, we find that the

government used "reasonable means" and, accordingly, that the District Court correctly deemed Adams to be "unavailable" for purposes of FRE 804.

D. Alleged Errors of District Court at Sentencing

The final three claims of error all concern Abramson's sentence.[6] Abramson's first claim is that the two-level enhancement for abuse of a position of trust was erroneously applied. The appropriate inquiry regarding abuse of a position of trust asks: (1) whether the defendant occupies a position of public or private trust and (2) whether the defendant abused that position in a way that significantly facilitated his or her crime. See U.S.S.G. § 3B1.3, Application Note 1. Abramson concedes that she held a position of trust. Furthermore, it is clear that Abramson and Thomas were significantly aided by the fact that Abramson was able to give her official approval to the false invoices without having others review those invoices or make any physical inspection of the roof; likewise, the two were aided by the fact that Abramson was able to direct her subordinate Keith Webster to identify and deplete necessary accounts as sources for payment. Accordingly, we find that the District Court's two-level increase on this ground was proper.

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[6]In addition to her specific arguments as to each individual enhancement, Abramson claims that Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), prevents the trial judge from making any factual determinations that increase a defendant's punishment. This Court has not read Apprendi so broadly and has stated that Apprendi does not apply in any case where there has not been a finding of some fact by the judge that has resulted in the defendant's being sentenced above the statutory maximum. See United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000); United States v. Cepero, 224 F.3d 256, 267 n.5 (3d Cir. 2000). Because Abramson's 30-month sentence is well within the 5-year statutory maximum for the offenses of conviction, Apprendi is inapplicable here.

Abramson's second claim relates to the seven-level enhancement via U.S.S.G. § 2F1.1 for the loss attributable to Abramson's offense. Abramson's argument is strictly a legal one in that she challenges the District Court's consideration of relevant, but acquitted, conduct in calculating the total loss, but not the loss figure itself. Contrary to Abramson's suggestion, both the case law and the Sentencing Guidelines have established that "acquitted conduct" is fair game for a trial judge to consider at sentencing if it is relevant or related to the offense of conviction. See e.g., United States v. Watts, 519 U.S. 148, 153 (1997); U.S.S.G. § 1B1.3(a)(2). Accordingly, we reject Abramson's challenge to the seven-level increase based on the loss attributable to her offense.

Abramson's final sentencing claim is one that she has only summarily presented: that the two-level enhancement for more than minimal planning was erroneously applied. We reject this claim as well because we find that Abramson and Thomas[7] were only able to commit the offense involving the Arthur Richards School after (1) several sets of invoices were produced (and adjusted to comply with the contracted hourly billing rate of $35 per hour), (2) the normal procedure regarding approval of bills was circumvented when the invoices were repeatedly sent directly to Abramson, and (3) a subordinate was directed to identify some accounts that could pay out the necessary funds to cover the invoices. These

[7]As stated in U.S.S.G. § 1B1.3(a)(1)(B), "relevant conduct" includes, "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). As such, it is the combined conduct of Abramson and Thomas that is the appropriate subject of inquiry in determining whether the more than minimal planning enhancement should be applied.

steps were certainly enough to constitute more than minimal planning; accordingly, we reject Abramson's challenge to this enhancement as well.

II.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

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Circuit Judge

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(Filed:)

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JUDGMENT

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This cause came to be heard on the record from the United States District Court for the District of the Virgin Islands and was argued on May 14, 2001,

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

ATTEST:

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Marcia M. Waldron, Clerk

Dated: ________________________________